

VERONICA NYONI
versus
BERNADETTE EVA NDORO N.O
(*Executrix Dative*, Estate late Elias Zvenyika Ndoro
DR942/19)

HIGH COURT OF ZIMBABWE
MATANDA MOYO J
HARARE, 10 October & 23 November 2016 and 23 June 2021
and 22 September 2021

Civil Trial

Mr A *Chimhofu*, for the plaintiff
Mr J *Dondo*, for the defendant

MATANDA-MOYO J: Plaintiff issued summons against the defendant for payment of the sum of fifty-three thousand one hundred and eighty-three dollars (\$53 183.00) being money allegedly due and owing to the plaintiff in terms of a verbal acknowledgement of debt made by the defendant in favour of plaintiff at the offices of Messrs Mbidzo, Muchadehama and Makoni legal practitioners. It is plaintiff's case that the defendant acknowledged being indebted to the plaintiff in the above sum on 28 July 2010 at number 8 Phillips Avenue Belgravia, and undertook to settle within a reasonable time. To date defendant has failed to settle the debt resulting in plaintiff approaching this court.

Defendant denied to the existence of such acknowledgement of debt and challenged plaintiff to produce a written acknowledgement of debt signed by the defendant. In the result the defendant denied being indebted to the plaintiff in the sum claimed nor any other sum.

The matter went for pre-trial conference and the issue referred to trial is whether or not defendant admitted being indebted to the plaintiff in the sum of fifty three thousand one hundred and eighty three dollars (\$53 183.00).

The plaintiff gave evidence that she used to be a director of Vercham Real Estate (Pvt) Ltd, a company owned by herself and her ex-husband. Whilst still with that company she used to manage defendant's properties. She was instructed by the late Elias Ndoro to sell his two stands namely; numbers 112 and 112A Nelson Mandela avenue for the sum of one hundred and forty thousand (\$140 000,00). During that period the late Mr Zvenyika urgently required fees for his child who was studying in New Zealand.

The plaintiff testified that she became interested in purchasing the stands and devised a way to do so without blowing her cover. She then approached one of her clients a certain Awak Haskour Jean to pose as the buyer. An agreement to purchase the stands was concluded between the said A H Jean and the late E Z M Zvenyika. The late E Z M Zvenyika in terms of the agreement registered a company called Kitkat Investments (Pvt) Ltd where himself and his wife were directors. He donated the property to the company. Thereafter the late Zvenyika was paid USD\$40 000.00. The plaintiff testified that in terms of the sale agreement the late Zvenyika was to change the directors of Kitkat to reflect A.H.Jean and plaintiff upon the receipt of the USD\$40 000.00. Plaintiff testified that she was handed over the original title deeds after paying USD\$40 000.00.

Around April 2008 plaintiff paid USD\$10 000.00 to the late Zvenyika after he had indicated he required the amount for payment of fees for his son. The payment was done through a direct transfer to the university. Around September 2008 the late Zvenyika demanded his title deeds back after the plaintiff failed to settle the difference. The dispute was handled by Mr *Daniel Mbidzo* of Messrs Mbidzo, Muchadehama and Makoni acting for the late Zvenyika whilst the plaintiff was assisted by Mr *H Nkomo* of Mtetwa and Nyambirai. Present in that meeting in addition to the lawyers were the late Zvenyika, plaintiff and Mr F Malinga. In that meeting the parties agreed that plaintiff had paid a total sum of USD\$50 000.00 towards the purchase of the property. The parties also agreed that conveyance fees required to transfer property into the late Zvenyika`s name was USD\$53183.00. Plaintiff testified that the late Zvenyika undertook to pay the above amounts totalling USD\$53 183.00 and cancel agreement of sale and get his property back.

Under cross-examination the plaintiff conceded that she was engaged by the late Zvenyika as his agent to sell his property. Plaintiff failed to disclose to her principal that she was the one purchasing the property. Whilst conceding that there arise issues of professional conflict in plaintiff being agent and buyer at the same time, plaintiff felt that by hiding her identity she dealt fairly with the seller who was also her principal. She admitted that A H Jean was not the actual buyer but she was. She insisted that the amount of USD\$53 183.00 came from her and not from Mr Jean. Upon being questioned on whether she was not attempting to defraud Mr Jean of his money, she insisted that Mr Jean had no interest in the matter as he only acted as plaintiff's front in the transaction. She therefore insisted that she was the rightful plaintiff in the matter.

Mr *Nkomo* who assisted the plaintiff at the said meeting testified that indeed the meeting took place. The late Zvenyika was present in the meeting and agreed that he had received the said amount which he undertook to reimburse. He testified that after the meeting he followed up the issue by writing a letter to the late Zvenyika's lawyers. He testified that he never received a response to the said letter. Under cross-examination he conceded that the acknowledgement of debt was never reduced to writing. He was shown a response to his letter by the late Zvenyika. Mr *Nkomo* denied ever receiving such letter but admitted the letter was received by Messrs Mtetwa and Nyambirai.

At the time of defence case Mr Zvenyika had passed on hence the substitution of him by his estate. The defendant is the executrix dative to the late Zvenyika estate and widow to the late Zvenyika. She testified on behalf of the defendant. She testified that plaintiff was engaged by the late Zvenyika to handle the sale of his property sometime in 2008. The plaintiff indicated she had found a buyer of Congolese nationality by the name Awak Haskour Jean who had agreed to purchase the property for USD\$140 000.00. An agreement of sale was entered into by the parties. She acknowledged that a total sum of USD\$50 000.00 was received towards the purchase of the property. No other amount was paid by Mr Jean. Her position is that the agreement was entered into with A.H.Jean and not plaintiff. She insisted that plaintiff had no *locus standi* to claim that amount. A letter written by the late Zvenyika in response to a letter written by Mr *Nkomo* was produced as evidence that plaintiff has always been an agent and not the buyer.

Under cross-examination she accepted authoring the document on pp 58 and 59 of the record. She admitted that under para(s) 6 and 7 she accepted receiving a total of USD\$50 000.00 from Vercham real estate, plaintiff's company. She also conceded the agreement of sale was not reduced to writing. She admitted that Kitkat Investments (Pvt) Ltd was registered for purposes of transferring the property in question. The initial directors of Kitkat were this witness and her late husband E.Z.M.Ndoro. On 17 March 2008 the directors were changed to read plaintiff and A.H.Jean and remained so until 12 September 2008 when the initial directors were reinstated. The property was then transferred from Kitkat to Gronton Investments (Pvt) Ltd, a company owned by this witness and her late husband. This witness maintained that she never at any time resigned from directorship of Kitkat. She could not have done that without the property having been paid in full.

The facts of this matter are to a large extent common cause. Plaintiff was engaged by the late Zvenyika to sell his property. She was representing the seller. She advised she had

found a buyer who had agreed to purchase the property for USD\$140 000.00. The buyer was one A.H.Jean. The buyer duly paid a total of USD\$50 000.00 through the plaintiff as deposit for the property. The buyer failed to settle the balance resulting in the late Zvenyika taking back ownership of his property. There is no doubt defendant is in possession of its property. The defendant did not reimburse the buyer of the deposit paid.

The fact in dispute is whether subsequent to repossession of the property by the late Zvenyika there was an acknowledgement by the late Zvenyika that he recognized plaintiff as the buyer and undertook to pay back the deposit. Plaintiff relied on a verbal acknowledgement. Plaintiff testified to that effect. Mr *Nkomo* who was the legal practitioner representing plaintiff then corroborated plaintiff's story. A letter was produced written by Mr *Nkomo* to Messrs Mbidzo, Muchadehama and Makoni referring to the meeting they held reference the matter. In that letter he referred to the acknowledgement of debt by the late Zvenyika and sought to be advised when that debt would be settled. He also referred to a debt of five hundred dollars (\$500.00) owed by the late Zvenyika. The five hundred dollars (\$500.00) was later settled. Such letter was written on 17 August 2010. The letter was received by the late Zvenyika's lawyers on 18 August. On the other hand defendant denied the existence of that verbal acknowledgement of debt. As evidence defendant produced a letter written by the late Zvenyika in response to the letter by Mr *Nkomo*. Such letter read:

“Please be informed that there was an agreement of sale of a property through Mrs Muringai as an agent and Jean Ashwak as the buyer.

By so doing there is breach of contract and your letter seems to state your client loaned me the stated amount.

There is need of interest charges to the defaulted part when settling this matter.
There are some missing parties according to your letter in this matter.”

Unfortunately Zvenyika was deceased at the time of trial and the executor testified. From the evidence it became clear that the parties had a habit of not reducing their agreements to writing. Their agreements were verbal. Initially the buyer was stated as Jean Awak. The plaintiff for all intents and purposes was the seller's agent. It is my view that the inclusion of plaintiff as director of Kit-Kat was to protect seller's interest and not as a reflection she was the purchaser. I do not believe any seller would pass total ownership before receiving the full purchase price.

However there is evidence that a round table conference was held between plaintiff and the late Zvenyika inclusive of their lawyers. What was discussed and agreed upon? Plaintiff's lawyer testified. I do not believe that as an officer of court he is able to mislead the court.

It is most probable that the late Zvenyika during the meeting in question had admitted being indebted to plaintiff but changed his mind thereafter insisting Jean Awak was the rightful purchaser. That explains why his then lawyers could not respond to plaintiff's then lawyers letter of 17 August 2010. That letter was responded to by the late Zvenyika who insisted the purchaser was Jean Awak.

The plaintiff sued on that alleged acknowledgement of debt. At the time of the suit the late Zvenyika had revoked the acknowledgement of debt. At the time of the summons there was no valid acknowledgement of debt by the late Zvenyika and suing on a cause of action which had been revoked was misplaced. Defendant submitted that it is not competent for plaintiff to base her claim on a verbal acknowledgement of debt. Counsel for defendant argued that an acknowledgement of debt is a document which contains an unequivocal admission of liability by the debtor. I was referred to what should be contained in an acknowledgement debt which are;

- (a) full names of debtor;
- (b) full names of creditor;
- (c) *domicilium citandi et executandi* or address of service;
- (d) the amount in full being acknowledged;
- (e) the time period in which the debt will be paid;
- (f) number of instalments if any; and
- (g) how payment will be made

Defendant submitted that the meeting of the 28 July was and remains an attempt at settling the dispute and never resulted in defendant acknowledging the debt. Whatever was agreed upon never constituted an acknowledgement of debt that could be enforced.

From the evidence led, at the referred meeting at Messrs Mbidzo, Muchadehama and Makoni Legal Practitioners the debtor was acknowledged as the late Mr Zvenyika. The creditor was agreed to be the plaintiff, the amount owed was agreed upon. The rest of the requirements of an acknowledgement of debt were not met as from the evidence submitted there was no

agreement as to when the debt would be paid. The letter written by the then plaintiff's lawyer is instructive on that point under second paragraph where he wrote:-

“-----Kindly advise as to when the same can be paid in full.”

The late Mr Zvenyika according to the above letter had agreed to settle a separate debt of \$500.00 of the date of the meeting.

An acknowledgement of debt is a contract between the debtor and creditor where the debtor acknowledges owing the creditor in a stated amount. Such acknowledgement should set the terms of paying off the debt. Once it is accepted that an acknowledgement of debt is a contract between the debtor and creditor, it therefore follows that it is permissible to sue on an oral contract, and hence on an oral acknowledgement of debt. However, testimony of witnesses is required to prove the existence and terms of such contract. See *Delta Beverages (Pvt) Ltd v Pivate Investments limited and Another* HH 135-18 where the court held that: where there is evidence of the oral contract meeting all requirements of a valid contract, then the court endorse that oral contract. Thus an oral contract which meets all requirements of a valid contract is binding and enforceable between the parties. The onus is on the party alleging the existence of that contract to prove its case on a balance of probabilities.

In the present case I am convinced that even though it is clear that the defendant is indebted to Mr Jean there was no acknowledgement of debt and plaintiff ought to have sued on a different cause other than on an acknowledgement of debt.

The cause of action was defined as:

“every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but each fact, which is necessary to be proved.”

See *Mackenzie v Farmers Co-operative Meat Industries Ltd* 1922 AD 16 at 23. See also *Evins v Shield Insurance Co. Ltd* 1980 (2) SA 814 A at 825G.

The evidence of plaintiff should therefore always establish the cause of action. I am of the view that the evidence of plaintiff has failed to establish all the requirements of an acknowledgement of debt and plaintiff is therefore not entitled to judgment in respect of its cause of action. Mr Jean was not called to testify that he was not the purchaser. Once the acknowledgement was, revokes the evidence of Mr Jean became crucial.

Accordingly, plaintiff has not established her case of a balance of probabilities in terms of the cause of action.

Also the fact that Mr Jean did not testify leaves the probability that the deposit belongs to him.]

Accordingly the claim cannot be granted and is dismissed with cost.

Mtewa and Nyambira, applicant's legal practitioners
Messrs Mbidzo, Muchadehama and Makoni legal practitioners, respondent's legal practitioners